



UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MICHAEL DAVITT,
Plaintiff,

vs.

DAVE NEELY,
Defendant.

3: 09-cv-0075-LRH-VPC

ORDER

Plaintiff, an inmate at Ely State Prison, is proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff's complaint (Docket #1-2).

Screening Standard Pursuant to 28 U.S.C. § 1915A

The court must screen plaintiff's complaint pursuant to 28 U.S.C. § 1915A. Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.

1 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1)
2 that a right secured by the Constitution or laws of the United States was violated, and (2) that the
3 alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*,
4 487 U.S. 42, 48 (1988).

5 In addition to the screening requirements under § 1915A, pursuant to the Prisoner
6 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claims, "if the allegation of
7 poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief
8 may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28
9 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon which relief may be
10 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same
11 standard under Section 1915(e)(2) when reviewing the adequacy of a complaint or amended
12 complaint.

13 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel*
14 *v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to state a
15 claim is proper only if it is clear that the plaintiff cannot prove any set of facts in support of the claim
16 that would entitle him or her to relief. *See Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In
17 making this determination, the Court takes as true all allegations of material fact stated in the
18 complaint, and the Court construes them in the light most favorable to the plaintiff. *See Warshaw v.*
19 *Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996). Allegations in a *pro se* complaint are held to less
20 stringent standards than formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9
21 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (*per curiam*).

22 All or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if
23 the prisoner's claims lack an arguable basis either in law or in fact. This includes claims based on
24 legal conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or
25 claims of infringement of a legal interest which clearly does not exist), as well as claims based on
26 fanciful factual allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S.

1 319, 327-28 (1989); *see also* *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

2 Screening of Complaint

3 This court has screened plaintiff's civil rights complaint pursuant to 28 U.S.C.
4 §1915A. Plaintiff brings this action against a sole defendant, Dave Neely, a food service manager.
5 Plaintiff seeks injunctive relief.

6 In describing the nature of the case, plaintiff claims that inmates' diets contain an
7 unacceptable amount of cholesterol. The complaint contains a single count, in which plaintiff claims
8 violations of his First Amendment right to petition the government for redress of grievances and his
9 Eighth Amendment right to be free of cruel and unusual punishment. Plaintiff alleges that inmates
10 are receiving over 4 eggs per week pursuant to the prison menu, which he claims results in high
11 cholesterol in human beings. Plaintiff further claims that this is contrary to the State Health
12 Department and U.S. Surgeon General guidelines for heart disease. Finally, plaintiff indicates in his
13 complaint that he has exhausted available administrative grievance procedures.

14 Prisoners have no constitutional right to an inmate grievance system. *Olim v.*
15 *Wakinekona*, 461 U.S. 238, 249 (1983). Thus, the non-existence of, or the failure of prison officials
16 to properly implement an administrative appeals process within the prison system does not raise
17 constitutional concerns. *Buckley v. Barlow*, 997 F.2d 494, 495 (8th Cir. 1993); *Flick v. Alba*, 932
18 F.2d 728 (8th Cir. 1991). "[A prison] grievance procedure is a procedural right only, it does not
19 confer any substantive right upon the inmates." *Buckley*, 997 F.2d at 495 (citing *Azeez v.*
20 *DeRobertis*, 568 F. Supp. 8, 10 (N.D. Ill. 1982); *see also* *Mann v. Adams*, 855 F.2d 639, 640 (9th
21 Cir. 1988). "Hence, it does not give rise to a protected liberty interest requiring the procedural
22 protections envisioned by the Fourteenth Amendment." *Azeez v. DeRobertis*, 568 F. Supp. at 10;
23 *Spencer v. Moore*, 638 F. Supp. 315, 316 (E.D. Mo. 1986). Specifically, failure to process a
24 grievance does not state a constitutional violation. *Buckley*, 997 F.2d at 495. Thus, a prison
25 official's involvement and actions in reviewing prisoner's administrative appeal cannot serve as the
26 basis for liability under a § 1983 action. *Buckley*, 997 F.2d at 495. In this case, plaintiff states that

1 he has exhausted his available administrative grievance procedures. As set forth above, the outcome
2 of that grievance procedure cannot stand as a basis for a constitutional claim. Accordingly, the court
3 finds that plaintiff does not state a First Amendment claim for violation of plaintiff's right to petition
4 the government for redress of grievances.

5 The Civil Rights Act under which this action was filed provides:

6 Every person who, under color of [state law] . . . subjects, or causes
7 to be subjected, any citizen of the United States. . . to the deprivation
8 of any rights, privileges, or immunities secured by the Constitution. . .
shall be liable to the party injured in an action at law, suit in equity, or
other proper proceeding for redress. 42 U.S.C. § 1983.

9 The statute plainly requires that there be an actual connection or link between the actions of the
10 defendants and the deprivation alleged to have been suffered by plaintiff. *See Monell v. Department*
11 *of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). The Ninth Circuit has
12 held that "[a] person 'subjects' another to the deprivation of a constitutional right, within the meaning
13 of section 1983, if he does an affirmative act, participates in another's affirmative acts or omits to
14 perform an act which he is legally required to do that causes the deprivation of which complaint is
15 made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Here, plaintiff has failed to link the
16 named defendant with any affirmative act or omission that caused the alleged constitutional
17 violations. That is, although plaintiff asserts that defendant Neely procures foodstuffs for the prison,
18 there is no indication that defendant Neely has any decision-making authority over the diet provided
19 to prisoners. The court finds, therefore, that the complaint fails to state a claim against defendant
20 Neely.

21 To constitute cruel and unusual punishment in violation of the Eighth Amendment,
22 prison conditions must involve "the wanton and unnecessary infliction of pain." *Rhodes v.*
23 *Chapman*, 452 U.S. 337, 347 (1981). Although prison conditions may be restrictive and harsh,
24 prison officials must provide prisoners with food, clothing, shelter, sanitation, medical care, and
25 personal safety. *Id.*; *Toussaint v. McCarthy*, 801 F.2d 1080, 1107 (9th Cir. 1986); *Hoptowit v. Ray*,
26 682 F.2d 1237, 1246 (9th Cir. 1982). Where a prisoner alleges injuries stemming from unsafe

1 conditions of confinement, prison officials may be held liable only if they acted with "deliberate
2 indifference to a substantial risk of serious harm." *Frost v. Agnos*, 152 F.3d 1124, (9th Cir. 1998)
3 (citing *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)). The deliberate indifference standard involves
4 an objective and a subjective prong. First, the alleged deprivation must be, in objective terms,
5 "sufficiently serious." *Farmer v. Brennan*, 511 U.S. at 834 (citing *Wilson v. Seiter*, 501 U.S. 294,
6 298 (1991)). Second, the prison official must "know of and disregard an excessive risk to inmate
7 health or safety." *Id.* at 837. Thus, "a prison official may be held liable under the Eighth
8 Amendment for denying humane conditions of confinement only if he knows that inmates face a
9 substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it."
10 *Farmer v. Brennan*, 511 U.S. at 835. The court finds as a matter of law that the inclusion of four
11 eggs per week in the prison menu does not constitute a substantial risk of serious harm sufficient to
12 support a claim under the Eighth Amendment, and that plaintiff's claim based on such inclusion is
13 purely speculative. The court therefore finds that plaintiff fails to state a claim upon which relief can
14 be granted based on the Eighth Amendment.

15 Conclusion

16 **IT IS THEREFORE ORDERED** that the clerk is directed to **FILE** the complaint
17 (Docket #1-2).

18 **IT IS FURTHER ORDERED** that the complaint is **DISMISSED** with prejudice for
19 failure to state a claim upon which relief can be granted. The clerk is direct to enter judgment
20 accordingly and to close this case.

21 Dated this 1st day of June, 2009.

22 
23 _____
24 UNITED STATES DISTRICT JUDGE
25
26